Allegheny Ludlum Corporation *and* United Steelworkers of America, AFL–CIO–CLC. Case 6–CA–26862

March 30, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN, HURTGEN, AND WALSH

The issue presented is whether the Respondent unlawfully polled its employees, in violation of Section 8(a)(1), by soliciting their participation in a campaign videotape which the Respondent presented to employees prior to the election. This case is on remand from the District of Columbia Circuit Court of Appeals, which has directed the Board to provide "conscientious employees, employers, unions, and adjudicators striving to stay within the strictures of the Act with some clear guidelines as to how to proceed in regard to company videotaping of employees." *Allegheny Ludlum Corp. v. NLRB,* 104 F.3d 1354, 1363 (D.C. Cir. 1997), denying enf. in pert. part to 320 NLRB 484 (1995).[1]

We agree with the court of appeals that there may be some confusion under existing case law concerning the circumstances in which an employer may lawfully include visual images of employees in campaign presentations.[2] Accordingly, and consistent with the court's remand, we have undertaken to articulate a clear statement of the principles governing this type of election campaign activity.[3]

[1] Following the court's remand, the General Counsel, the Charging Party, and the Respondent filed statements of position.

[2] Some employers use videotape presentations as a means of communicating their message to voters during representation election campaigns. The Board received evidence concerning the use of campaign videotapes in *Flamingo Hilton-Reno,* 32–CA–14378, which also presented the question of whether an employer violated Sec. 8(a)(1) by soliciting employees to appear in an election campaign video. On August 7, 1996, the Board heard oral argument in *Flamingo Hilton-Reno* and in *Randell Warehouse of Arizona, Inc.,* Case 28–RC–5274. The parties in *Flamingo Hilton*, as well as the following amici curiae, all filed briefs and participated in the oral argument concerning the issues presented in the case: the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); the Council on Labor Law Equality (COLLE); the Labor Policy Association; and Projections, Inc. *Flamingo Hilton-Reno* was resolved by non-Board settlement prior to the issuance of a decision by the Board in the matter. Subsequently, the Board issued its decision in *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), holding that, in the absence of express or implied threats or other coercion, a union generally may lawfully photograph employees while they are engaged in Sec. 7 activities.

[3] Consistent with our usual practice, we shall apply these principles not only "to the case in which the issue arises," but also "to all pending cases in whatever stage." *Deluxe Metal Furniture Co.,* 121 NLRB 995, 1006–1007 (1958). See *FES,* 331 NLRB No. 20, slip op. at 4 fn. 6 (2000).

Facts

On December 2, 1994,[4] an election was held in a unit of office clerical and certain unrepresented technical employees employed at the Respondent's Pittsburgh, Pennsylvania facility. The tally of ballots showed 225 for and 237 against representation.

A few weeks before the election, the Respondent began filming for a videotape (entitled "The 25th Hour") to be used as part of its antiunion campaign. Respondent's Manager of Communication Services Ziemianski personally supervised the filming by an outside video crew.

On November 14, Ziemianski and the video crew approached several employees at their workplaces and asked them if they would consent to be filmed. Employees who agreed to be filmed were instructed to sit at their desks and, upon hearing a cue, turn and face the camera, smile and wave. Some employees were given a written notice prior to being filmed which stated that the video was for use in the election campaign and that employees who wished to be cut from the film should contact the Respondent's Human Resources managers. Other employees were filmed without a prior explanation of the purpose of the video.

Later on November 14, after learning that the video was for use in the election campaign, employee Goralka called Director of Employee Relations Kurcina and told her that he and several of his coworkers preferred not to appear in the video. Kurcina told Goralka to make his request to Ziemianski, in writing, which he did, listing the employees who did not want to be included in the videotape. Ziemianski told Goralka that it would be no problem to remove the images of the objecting employees as requested.

On November 15 and 16, Ziemianski continued filming for the video but only after distributing written notices advising employees that the Employer was preparing a video for use in the campaign. One version of the notice directed employees who did not wish to appear in the video to contact Kurcina or Human Relations Counsel Spolar. The second told employees to notify the video crew. Employee Minnich agreed to be videotaped after being approached by Ziemianski, who announced "here is someone who will be photographed." Minnich was given the written notice to read and told that she did not have to be in the video if she did not want to. Her coworkers all declined to be in the video. Employee Miller volunteered to be in the video when the video crew came through her work area. Some of her coworkers declined to be filmed and left the area while the camera was on.

[4] All dates hereafter are in 1994.

Ziemianski testified that he eventually filmed about 17 percent of the voting unit (at least 80 employees). About 30 employees submitted written requests to be excluded from the videotaping, and the Respondent maintained a list of the names of all of the objecting employees. Many employees also complained to the Union about the videotaping; although the Union complained to the Respondent and accused it of polling employees, the Respondent continued its videotaping and eventually showed the finished product to unit employees. None of the objecting employees' images were shown in the final version of the video presented to employees.

The videotape, which was entered into evidence, includes segments in which unit employees discuss their satisfaction with the status quo at Allegheny Ludlum and their dissatisfaction with union representation at prior employers, and state that they intend to vote "no" in the upcoming election. Employees at other Allegheny Ludlum facilities, and employees of other employers, also appear on camera voicing their dissatisfaction with the Charging Party Steelworkers Union as their bargaining representative. A narrator observes, among other things, that the Respondent has not had any layoffs among its nonunion employees since 1980, while several employees note that unionized bargaining units of Allegheny Ludlum and other employers have had layoffs. The videotape closes with images of unit employees at their workplaces, many of whom are shown waving at the camera. The sound track accompanying this portion of the videotape includes upbeat music with such lyrics as "Allegheny Ludlum is you and me" and statements by the narrator and employees as to why employees should vote against representation.

The Union also produced a campaign video which was mailed to 300 employees. The video was filmed by the Union at a union meeting; employees at the meeting were approached and asked to participate in the filming.

The Judge's Decision

Consistent with the relevant complaint allegation, the judge found that the Respondent unlawfully polled employees by its actions with regard to the filming of the campaign videotape. The judge found that the Respondent did not merely film employees who volunteered but instead required employees to object in order to avoid being filmed. Moreover, some employees were not told in advance of the filming that they could opt out, and the Respondent failed to give assurances to employees that they would not suffer adverse consequences if they refused to participate. The judge also noted that the Respondent maintained a list of objecting employees which survived the taping process for "unstated reasons."[5]

The Board's Decision

The Board adopted the judge's decision with respect to the alleged polling violation.[6] In an effort to insure that its holding with respect to this violation was consistent with prior decisions, the Board considered the applicability to this case of the Board's decision in *Sony Corp. of America.*[7] As explained more fully below, the Board held in *Sony* that the employer violated Section 8(a)(1) by using, without their consent, employees' likenesses in a videotape urging employees to decertify an incumbent union. In its prior decision in this case,[8] the Board stated that the finding of a violation in the circumstances of this case was not inconsistent with the principles set forth in *Sony.*[9] The Board reasoned that its finding, in *Sony,* that videotaping employees without their consent and using the images in a campaign videotape shown to unit employees was unlawful, did not establish that photographing of employees under similar circumstances *with* their consent was necessarily lawful. The Board also noted there was no evidence that the Respondent had relied on *Sony* in structuring its antiunion videotaping.[10]

The Court of Appeals' Decision

The D.C. Circuit denied enforcement of the Board's decision with regard to the videotaping issue.[11] The court held that the Board's polling, interrogation, and videotaping cases established conflicting mandates and failed to articulate a clear standard to guide employers, unions, and others. In the court's view, in cases where an employer seeks to use filmed images of employees in its campaign against unionization, *Sony's* consent requirement "may have put the Board's 'polling doctrine' on a collision course with the free speech rights of employers under § 8(c)."[12] The court was particularly troubled by the apparent inconsistency between *Sony's* consent requirement and a separate line of cases appearing to im-

[5] The judge also found that the Respondent coercively interrogated employees, threatened employees with various reprisals including job loss and layoffs, unlawfully terminated employee James Borgan, and engaged in objectionable conduct requiring that the election held December 2 be set aside.

[6] 320 NLRB at 484 fn. 2.

[7] 313 NLRB 420, 428–429 (1993) (employer violated Sec. 8(a)(1) by using employee photographs without employee consent).

[8] 320 NLRB at 484 fn. 2.

[9] 313 NLRB at 428–429.

[10] The Board also affirmed the other violations found by the judge as well as his recommendation that the election be set aside.

[11] The court enforced the Board's order with respect to all of the other violations found in this case.

[12] *Allegheny Ludlum v. NLRB,* supra, 104 F.3d at 1358.

pose Section 8(a)(1) liability on employers for seeking the very consent which *Sony* requires:

> [I]t is undisputed that § 8(c) protects an employer's pure right to express an anti-union message to its employees . . . . Thus, an employer might conclude that under § 8(c) it has the right to make an anti-union videotape including footage of contented employees, as a necessary component of the message it wishes to express. But should the employer prepare such a videotape, an obligation may well attach under the *Sony* decision that the employer obtain the consent of the employees included in the tape before displaying it to other employees. Therein lies the rub: the Board's "polling" cases suggest that by soliciting its employees' consent to be included in the anti-union videotape, the employer may be in effect "polling" them as to their union sentiment, in violation of § 8(a)(1).

Id. at 1362. In these circumstances, the court concluded that the Board's "earlier assurances that 'polling' cannot involve protected expression" under Section 8(c) were inadequate.[13]

The court further stated that whether this solicitation of consent would constitute an unlawful interference with Section 7 rights does not turn on the employer's intent. Rather, the relevant question is whether the solicitations would tend to create among the employees a reasonable impression that the employer was trying to discern their union sentiments.[14] In the court's view,

> Clearly some methods of soliciting employees to appear in anti-union video presentations would not raise significant "polling" concerns; for example, the company might seek to include only those employees who have on their own initiative clearly expressed opposition to union representation. But once we leave that safe harbor the water gets rough; if a post-filming request for permission always amounts to "polling," does the *Struksnes*[15] standard for "polling" still apply? An affirmative answer would surely condemn most such videotaping. And even within the safe harbor, how far employers may go in making inquiries to locate those who are overtly against the union will depend on how likely it is that such inquiries would tend to give other employees the reasonable impression that the employer is attempting to discern their sentiments.

Id. at 1363–1364.

The court of appeals was troubled by the seemingly inconsistent approaches that the Board's judges have taken in resolving the issues presented by post-*Sony* videotaping of employees. The court stated that the Board "has a duty to provide conscientious employees, employers, unions, and adjudicators striving to stay within the strictures of the Act with some clear guidelines as to how to proceed in regard to company videotaping of employees."[16] In the court's view, the issues involving employer videotaping of employees are "well suited to the Board's expertise and experience."[17] Accordingly, the court remanded this case for further consideration and the articulation of a clear Board policy as to how employers may lawfully proceed.[18]

Positions of the Parties

The General Counsel asserts that the Board should reaffirm its order finding that the Respondent unlawfully polled its employees. The General Counsel accepts the principle that a videotape whose purpose is to express the employer's views concerning unionization is generally protected by Section 8(c). But he asserts that the various means by which the Respondent filmed employees, solicited them to appear in the videotape, and maintained records of employees who sought to "opt out" of being included in the videotape would reasonably suggest to the employees that the Respondent was seeking to learn their views concerning union representation. Thus, according to the General Counsel, the Respondent interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights in violation of Section 8(a)(1).

The General Counsel further proposes that the Board adopt a rule, modeled after the Board's existing rules respecting employer polling, and hold that

> [a]bsent unusual circumstances, employer requests that employees consent to the use of their photographic image in employer videotapes or other campaign propaganda will violate section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the video is to express the employer's views concerning the organizing campaign; (2) that purpose is communicated to the employees in advance of filming; (3) assurances are given to employees that no reprisals will be taken against those who elect not to participate and no benefits will be given to those who do; (4) consent forms are made available to employees at a location and in a manner that allows self-selection by employees in advance of their being photographed and does

[13] Id. at 1363.
[14] Id. at 1362.
[15] *Struksnes Construction Co.,* 165 NLRB 1062 (1967). As discussed below, the Board in *Struksnes* held that an employer's poll of unit employees, for the purpose of determining a union's majority status, is unlawful unless certain safeguards are observed.

[16] *Allegheny Ludlum v. NLRB,* supra at 1363.
[17] Id. at 1364.
[18] Id.

> not force them to make an observable choice in the presence of supervisors or managers; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Applying this test, the General Counsel asserts that the Respondent's actions violated Section 8(a)(1) as alleged.

The Charging Party also urges the Board to reaffirm its prior order. In the Charging Party's view, an employer may never lawfully solicit employees to participate in its antiunion campaign, because the Board has consistently held that employers may not lawfully enlist employees to dissuade their fellow employees from supporting the union or to disseminate the employer's antiunion views. Because the solicitation itself is inherently coercive, the Charging Party reasons that any standard setting forth circumstances in which an employee may be asked to consent to participate in the employer's campaign is necessarily contrary to the Act. The Charging Party also maintains that Section 8(c) does not give employers the right to include employees in their campaign videos, that antiunion employees do not have a Section 7 right to appear in such videos, and that it is entirely consistent with the policies of the Act to bar employers from using employees in their campaign propaganda even though unions are allowed to do so.

The Respondent asserts that its actions in filming employees were not impermissible "polling" because its purpose was not to learn employees' union sentiments, but instead to participate in the workplace debate regarding unionization by involving its employees in a campaign videotape. According to the Respondent, its efforts to participate in the campaign in this fashion were protected by Section 8(c). In addition, the Respondent claims that its efforts to obtain employee consent were required to insure that employee participation was voluntary, that it communicated the purpose of the filming in advance, and that it honored requests not to be included in the final videotape.

DISCUSSION

I. GENERAL PRINCIPLES

Section 7 provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157. Thus, employees have the right to, inter alia, support or oppose union representation and to participate, or refrain from participating in an NLRB election campaign.[19] Any interference with, restraint or coercion of an employee's exercise of these rights by an employer violates Section 8(a)(1) of the Act.

Section 8(c) provides that

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). Congress added Section 8(c) to the Act in 1947, as part of the Taft-Hartley Act, because it believed that the Board had made it "excessively difficult for employers to engage in any form of noncoercive communications with employees regarding the merits of unionization."[20]

The Board and the courts have long recognized that an employer's efforts to discern the union sentiments of employees may "instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained."[21] However, in evaluating whether an employer's conduct falls within Section 8(a)(1)'s proscription, "[i]t is a reasonable tendency under the circumstances which governs the inquiry in each case."[22] The Board has applied these principles, not only in cases involving explicit questions concerning an employee's union activities or sentiments, but also in cases where an employer seeks to learn employees' views on union representation by more subtle means.[23]

The Board has also found that an employer violates Section 8(a)(1) by engaging in systematic efforts to determine the union sentiments of a substantial number of

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[19] See *NLRB v. The Magnavox Co.,* 415 U.S. 322, 326 (1974) ("employees supporting the union have as secure § 7 rights as those in opposition.").

[20] *Allegheny Ludlum v. NLRB,* 104 F.3d 1354 at 1361 (D.C. Cir. 1997). The Board has held that, while Sec. 8(c) is not by its terms applicable to representation cases, the "strictures of the [F]irst [A]mendment, to be sure, must be considered in all cases." *Dal-Tex Optical Co.,* 137 NLRB 1782, 1787 fn. 11 (1962).

[21] *NLRB v. West Coast Casket Co.,* 205 F.2d 902, 904 (9th Cir. 1953). See also *Cannon Electric Co.,* 151 NLRB 1465, 1468 (1965) ("An employer cannot discriminate against union adherents without first determining who they are.").

[22] *Sunbelt Mfg. Inc.,* 308 NLRB 780 fn. 3 (1992), affd. in part 996 F.2d 305 (5th Cir. 1993).

[23] See, e.g., *Wellstream Corp.,* 313 NLRB 698 fn. 2 (1994) (betting pool concerning outcome of election); *Melampy Mfg. Co.,* 303 NLRB 845 (1991) (employer announced quiz on election issues during critical period with prize for employee with most correct answers; employees required to sign name on quiz form); *Houston Chronicle Publishing Co.,* 293 NLRB 332 (1989) (same).

employees through tactics which amount to a "poll."[24] The Board has generally found that, absent unusual circumstances, such polls are coercive, unless certain safeguards are observed:

> (1) the purpose of the poll is to determine the truth of a union's claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisal are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.[25]

The Board has rejected the position that Section 8(c) protects an employer's efforts to discern, through polling or coercive interrogation, the union sentiments of employees. The Board has reasoned that "an employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of the inquiry is not to express views but to ascertain those of the person questioned."[26]

II. THE BOARD'S *SONY* DECISION

The Board has held that employers have the right to present noncoercively their position regarding a union organizing campaign, including through the use of antiunion campaign videotapes depicting strikes at other employers.[27] However, different considerations arise when an employer wishes to show a videotape depicting its own unit employees. Thus, in *Sony*,[28] the employer decided to create a campaign video urging employees to vote against continued union representation in an upcoming decertification election. The employer also decided to photograph virtually all unit employees and include their pictures in the video. A company vice president testified that he instructed a supervisor not to tell employees the real reason for taking their photographs; if questioned by employees, the supervisor and the photographer "were supposed to make something up." When employees asked why they were being photographed, the supervisor answered that she and the photographer "were from headquarters;" another employee was told that "they had extra film which they wanted to use up."[29]

A few days before the decertification election, the employer showed the videotape to its employees in meetings held at their workstations during working time. The 30 minute video consisted of approximately 27 minutes of narration followed by approximately 3 minutes of employee photographs. The narration stated in detail the employer's reasons why the employees no longer needed the union. The final 3 minutes showed approximately 85 still photographs, most of which were of bargaining unit employees, accompanied by a song and music. The lyrics of the song expressed the idea that although Sony employees had a lot of work ahead, they have a good job and "now we've got a guarantee, that we won't lose if we decertify, and that's enough for me."[30]

Three union stewards were among the employees whose photographs were shown at the end of the film. One shop steward testified that she was "embarrassed" to see her own photograph used in the company video and that she ran out of the room during the question-and-answer session. Another shop steward testified that when employees asked her why she was in the video, she responded that she "was just as shocked" as they were. The third shop steward testified that employees wanted to know why she participated in a film that was antiunion when she was a shop steward.[31]

On these facts, the Board in *Sony* adopted the judge's conclusion that the employer violated Section 8(a)(1) by using the employees' photographs in the antiunion videotape. Based on his review of the video, the judge found that "a viewer could reasonably conclude that the laughing and smiling photographs of unit employees whose faces appear during the film . . . were meant to show support for the antiunion message of the film as a whole."[32] The judge further found that the employees did not consent to having their pictures used to give seeming approval to the employer's antiunion message; rather, the employer "tricked employees into posing for pictures to incorporate into its antiunion film."[33]

III. ANALYSIS

In remanding this case, the D.C. Circuit stated that the Board has failed to provide clear guidance to employers,

[24] *Struksnes Construction Co.,* supra, 165 NLRB at 1063.

[25] Id. The D.C. Circuit applied the *Struksnes* safeguards in *Midwest Regional Joint Board v. NLRB,* 564 F.2d 434, 444–445 (D.C. Cir. 1977).

As more fully discussed below, the Board has also held that an employer may lawfully interrogate employees about their union activities in the course of investigating a complaint charging the employer with unfair labor practices, provided that certain safeguards are observed. See *Johnnie's Poultry,* 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[26] *Struksnes Construction Co.,* supra, 165 NLRB at 1062 fn. 8. Accord: *Martin Sprocket & Gear Co. v. NLRB,* 329 F.2d 417, 420 (5th Cir. 1964); *NLRB v. Minnesota Mining & Mfg. Co.,* 179 F.2d 323, 326 (8th Cir. 1950).

[27] See, e.g., *Pick Your Part Auto Wreckers,* 294 NLRB 446 (1989); *Sab Harmon Industries,* 252 NLRB 953 (1980); *Litho Press of San Antonio,* 211 NLRB 1014, 1015 (1974), enfd. on other grounds 512 F.2d 73 (5th Cir. 1975).

[28] *Sony of America*, supra, 313 NLRB at 423–424.

[29] Id.

[30] Id. at 425.

[31] Id. at 426.

[32] Id. at 429.

[33] Id.

unions, and employees regarding the circumstances in which employers may use the image of employees in campaign videotapes. In response to the court's invitation, we shall endeavor to alleviate any confusion that may have arisen.

We believe that the court's remand requires us to discuss two interrelated issues. First, we must decide whether an employer may lawfully ask employees to participate in a campaign videotape and, if so, under what circumstances such a request may be made. Second, in cases where an employer has not asked employees, in advance, whether they wish to participate in a campaign videotape, we must decide whether, and if so under what circumstances, an employer may lawfully include images of the employees in the videotape. In our view, these questions may be answered by reference to established principles concerning employees' Section 7 rights.

A. An Employer May Include in a Campaign Videotape Employees Who Volunteer to Participate Under Non-Coercive Circumstances

In numerous prior cases, the Board has held that an employer violates Section 8(a)(1) by distributing antiunion paraphernalia to employees in circumstances in which "the employees are forced to make an observable choice that demonstrates their support for or rejection of the union."[34] In *Kurz-Kasch, Inc.,*[35] the Board explained that

> an employer's request, during an election campaign, that an employee wear a "vote no" button or other proemployer insignia constitutes a form of interrogation because, by agreeing or refusing to wear the button, the employee is forced into an open declaration either for or against the Union.

The Board has consistently applied these principles in subsequent cases to find similar employer conduct violates Section 8(a)(1) and/or constitutes objectionable conduct affecting an election.

For example, in *A.O. Smith Automotive Products Co.,*[36] the Board found that the employer violated Section 8(a)(1) when its supervisors approached employees, individually and in groups, and offered them "vote no" buttons, caps, and t-shirts. The Board found that, by directly offering employees antiunion paraphernalia in this manner, the employer effectively put them in a position of having to accept or reject the respondent's proffer, thereby disclosing their preference for or against the union. Likewise, in *House of Raeford Farms,*[37] the Board found that the employer violated Section 8(a)(1) by maintaining a supply of 1000 "vote no" t-shirts at its supply room, which were provided to employees who were not wearing prounion apparel and who signed a list acknowledging receipt of the t-shirt. The Board found that the employer's t-shirt distribution was coercive because employees were required to refrain from displaying support for the Union in order to get a shirt, and because the employer's list-keeping allowed it to "discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts."[38]

On the other hand, the Board has also held that "an employer may [lawfully] make antiunion paraphernalia available to employees at a central location unaccompanied by any coercive conduct."[39] As the Board explained in *Jefferson Stores, Inc.,*[40] the distribution of antiunion paraphernalia under these circumstances, unaccompanied by threats or promises of benefits, is not coercive, and accordingly does not constitute either an unfair labor practice or objectionable conduct in an election case. In *Farah, Mfg. Co.,*[41] the Board applied these principles to find that the employer lawfully distributed "happy badges" to employees where the badges were placed in boxes at central locations where employees (and supervisors) could pick them up. The badges included such slogans as "Yes! I'm satisfied at Farah—Those who are not are outside." In the absence of any evidence that employees were pressured into revealing their preference for or against the union, the Board found that the distribution of the buttons was lawful.[42] Likewise, in *Black Dot,*

[34] *Barton Nelson, Inc.,* 318 NLRB 712 (1995). See also cases cited in fn. 38, below.

[35] 239 NLRB 1044 (1978).

[36] 315 NLRB 994 (1994) (the Board found it unnecessary to pass on the lawfulness of distributing paraphernalia to open union adherents).

[37] 308 NLRB 568, 570 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994).

[38] Id. at 570. See also *Barton-Nelson,* supra (employer's supervisors unlawfully distributed antiunion hats directly to employees); *Laidlaw Transit,* 310 NLRB 15, 17 (1993) (supervisor unlawfully distributed "vote no" hats while urging employees to vote against union); *Gonzales Packing Co.,* 304 NLRB 805 (1991) (supervisor unlawfully visited employees at their workstations the day before the election and asked them if they wanted a "vote no" sticker like those worn by antiunion employees); *Lott's Electric Co.,* 293 NLRB 297, 303–304 (1989), enfd. mem. 891 F.2d 282 (3d Cir. 1989) (employer unlawfully distributed "vote no" buttons to employees).

[39] *Barton Nelson,* supra, 318 NLRB at 712 (recognizing rule). See also *Schwartz Mfg. Co.,* 289 NLRB 874, 879 (1988), enfd. 895 F.2d 415 (7th Cir. 1990) (distribution of "vote no" buttons not coercive under circumstances of the case); *Wm. T. Burnett & Co.,* 273 NLRB 1084, 1092–1093 (1984) (same); *McDonald's,* 214 NLRB 879, 881–883 (1974) (same).

[40] 201 NLRB 672, 673 (1973).

[41] 204 NLRB 173, 175–176 (1973).

[42] The Board found that the employer in *Farah* violated Sec. 8(a)(1) when, in one isolated incident, a supervisor asked an employee why she did not have a "happy badge" and then subsequently insisted on getting one for her.

Inc.,[43] the Board found that the employer did not engage in objectionable conduct by placing proemployer and antiunion buttons in a flowerpot that was hung on a wall in the employee cafeteria. Noting that the employer had instructed its supervisors not to discuss the buttons with employees, and that there was no evidence of any participation by supervisors in the distribution of the buttons, the Board found that "the Employer's conduct in merely making buttons available to employees on a voluntary basis, in the absence of supervisory involvement in the distribution process and unaccompanied by independent coercive conduct, does not require that the election be set aside."[44]

Consistent with the foregoing principles, we hold that an employer may not lawfully solicit individual employees to appear in a campaign videotape. As with direct supervisory proffers of antiunion campaign paraphernalia, a direct request that employees appear in an antiunion videotape would put the employees in a position in which they reasonably would feel pressured to make "an observable choice that demonstrates their support for or rejection of the union."[45] An employee in such a situation reasonably would believe that a refusal to appear in the videotape would be construed as a rejection of the employer's position in the campaign. The Board has found that employer tactics which are reasonably calculated to elicit such a response constitute unlawful interrogation,[46] or polling,[47] of employees. This analysis is equally applicable in the case of employer requests to participate in a campaign videotape.

We recognize that, in remanding this case, the court of appeals has suggested that an employer may lawfully solicit the participation of employees "who have on their own initiative clearly expressed opposition to union representation."[48] Our dissenting colleague similarly asserts that an employer may lawfully directly solicit an employee who has openly and voluntarily expressed opposition to union representation. In our colleague's view, such solicitations cannot constitute coercive polling or interrogation because the employee's views are already known. With all due respect to the court of appeals, and to our dissenting colleague, at least in the context of employer campaign videotapes we do not believe that the creation of such an exception to the principles set forth above would be either wise or workable.

The Board and the courts have consistently recognized that "the right to engage in union organizing or not is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute."[49] In other words, employees have the "right to express an opinion or to remain silent."[50] In our view, and consistent with the foregoing principles, Section 7 necessarily protects as well an employee's right to choose the *degree* to which he or she wishes to express support for, or opposition to, union representation. An employee, having once expressed opposition to union representation in some fashion, does not thereby forfeit the right to make for himself or herself, free of employer coercion, the entirely separate choice of whether to participate, or not to participate, in the employer's campaign by appearing in a campaign videotape.[51]

Contrary to our dissenting colleague, the coercive impact of a direct solicitation is not diminished merely because an employee has previously openly opposed the union in some manner. Regardless of whether the targeted employee's views concerning representation are known, an employee would be pressured, by such solicitation, into making "an observable choice" concerning his or her degree of involvement in the election cam-

[43] 239 NLRB 929 (1978).

[44] Id.

[45] *Barton Nelson,* supra, 318 NLRB at 712.

[46] See cases cited in fn. 38, supra.

[47] The Board has generally analyzed the distribution of campaign materials as alleged interrogations. However, the Board has recognized that an employer may engage in unlawful polling of employees through more subtle means than an explicit survey of employee preferences concerning representation. See, e.g. *Florida Steel Corp.,* 224 NLRB 587, 588–589, 594 (1976), enfd. mem. 552 F.2d 368 (5th Cir. 1977) (employees required to pose for photograph while holding "vote no" signs). In any event, the touchstone in all Sec. 8(a)(1) cases is whether under all the circumstances, the employer's actions have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. An employer's request, made directly to employees, that they participate in a campaign videotape, especially if authorized by high levels of management, plainly falls within this proscription, and a finding that it constitutes unlawful polling of employees is entirely consistent with the Board's prior approach in cases of this type.

[48] *Allegheny Ludlum v. NLRB,* supra, 104 F.3d at 1363–1364.

[49] *Dawson Construction Co.,* 320 NLRB 116, 117 (1995). See also *Reno Hilton,* 319 NLRB 1154, 1156 (1995) (employer violated Sec. 8(a)(1) by requiring employees to wear antiunion t-shirts); *Scientific Atlanta,* 278 NLRB 467 fn. 2 (1986) (employer engaged in objectionable conduct by requiring employees to distribute antiunion literature: "To require employees to disseminate antiunion literature violates the Section 7 right to engage in union activity or to refrain from engaging in activity for any party during the election campaign.").

Chairman Truesdale notes that he dissented in *Dawson Construction Co.,* supra, on the specific facts of that case, but agrees with the legal principles set forth therein.

[50] *Texaco, Inc. v. NLRB,* 700 F.2d 1039, 1043 (5th Cir. 1983).

[51] See *Gonzales Packing Co.,* supra, 304 NLRB at 816 (supervisor violated Sec. 8(a)(1) by approaching employees, some of whom had previously voiced antiunion sentiments, and asking them to wear "Vote No" buttons).

We additionally observe that it would be difficult, in practice, to determine whether an employee has sufficiently identified himself as antiunion to warrant the conclusion that an employer's direct solicitation of that employee, to appear in a campaign videotape, was not coercive.

paign.[52] As discussed above, an employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning representation. This includes whether to oppose the union independently of the employer's own efforts, or to oppose representation by, for example, wearing an employer's campaign paraphernalia or, alternatively, by appearing in an employer's campaign videotape. Each of these alternatives represents a distinct level of involvement in the election campaign. A direct solicitation pressures employees into making an observable choice, and thereby coerces them in the exercise of their Section 7 rights.

Our conclusion that individual solicitations of employees are coercive even where the employee has "openly and voluntarily expressed their opposition to union representation" is not inconsistent with the Board's decisions in *Rossmore House*[53] and *Sunnyvale Medical Clinic*.[54] In those cases, the Board found that casual and spontaneous questions about an employee's union activities, posed by front line supervisors in direct response to the employee's voluntary self-identification with the union cause, were not coercive under the totality of the circumstances of those cases, including the fact that the employee was an open union supporter. However, the Board has not applied this analysis in cases where an employer solicits employees to campaign against union representation. Rather, the Board has consistently held that such solicitation violates Section 8(a)(1) without reference to whether the solicited employee's union sentiments are known to the employer.[55] As stated in *Gonzales Packing Co.,* supra, "it involves the drawing of false parallels to apply the teachings of *Rossmore House* . . . to suppose" that a supervisor's solicitation of employees who had "previously voiced antiunion sentiments" to wear "Vote No" stickers "would have no 'coercive' impact."[56] As the employees in question "had not yet chosen to distinguish themselves by wearing a "NO" sticker," the supervisor's "solicitations would tend to be seen as 'pressure' from management to 'join the campaign' even by employees who might have been otherwise disposed to vote 'No.'"[57] We find these principles equally applicable to direct employer solicitation of employees to appear in an antiunion video, and that *Rossmore House* and *Sunnyvale* are therefore clearly distinguishable.

Moreover, we find that *Rossmore House* and *Sunnyvale* are also clearly distinguishable by the nature of the questioning in those cases. As indicated above, in those cases a supervisor posed casual and spontaneous questions to an employee concerning union activity. By contrast, an employer's soliciting an employee to appear in an antiunion campaign videotape is neither spontaneous nor casual but is instead a deliberate, official request of the employer. Even under the *Rossmore House* line of cases, the Board has found that questioning of this character, even of an open union supporter, is coercive.[58] As the Fifth Circuit has stated, the mere fact that an employee "was a widely-known union adherent does not validate otherwise coercive interrogation: 'Although an employee has openly declared his support for the union, the employer is not thereby free to probe directly into his reason for supporting the union.'"[59] Consistent with these principles, we hold that an employer may not likewise probe into the depth or degree of the employee's opposition to the union by directly soliciting the employee to appear in the employer's antiunion campaign video.

The campaign paraphernalia cases provide a useful analogy for approaching the analytically distinct question of whether an employer may lawfully include in a campaign videotape employees who volunteer in response to

[52] *Barton Nelson, Inc.,* supra, 318 NLRB at 712.

[53] 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985).

[54] 277 NLRB 1217 (1985).

[55] *Medical Center of Ocean County,* 315 NLRB 1150, 1153 (1994) (supervisor unlawfully asked employees to convince coworkers to give employer another chance). See also *PYA/Monarch, Inc.,* 275 NLRB 1194, 1196 (1985) (employer unlawfully asked employee who had voluntarily expressed "mixed feelings" about union representation to tell other employees to vote against union); *Autoglass & Upholstery,* 264 NLRB 149, 153 (1982), enfd. sub nom. *NLRB v. Garon,* 738 F.2d 140, 143 (6th Cir. 1984) (employer violated Sec. 8(a)(1) by asking employee to "help him out" by telling other employees that the union had "done him no good" at a prior job); *Hendrix Mfg. Co.,* 139 NLRB 397, 405–406 (1962), enfd. 321 F.2d 100 (5th Cir. 1963) (employer violated Sec. 8(a)(1) by requesting both pro and antiunion employees to persuade coworkers to vote against union).

Contrary to the dissent, these cases stand for the proposition that individual solicitations of employees to participate in an employer's union election campaign are inherently coercive, and thus unlawful, whether or not the employee has previously indicated that he or she opposes representation. Our colleague's assumption that such solicitations could be posed "in a noncoercive way" is inconsistent with this long-standing precedent, and we therefore decline to embrace it.

[56] 304 NLRB at 816.

[57] Id.

[58] See *Beverly California Corp.,* 326 NLRB 153, 157 (1998), enfd. in pert. part 227 F.3d 817 (7th Cir. 2000) (systematic questioning of open union supporters initiated by labor consultant was coercive under all the circumstances); *Frances House, Inc.,* 322 NLRB 516, 522 (1996) (interrogation of open union supporters held coercive; mere fact that employees had announced their union allegiance "did not invite selective, persistent individual grilling about their own or other employees' protected and union activities and sentiments in a closed door office by a high-ranking visiting manager.").

[59] *NLRB v. Brookwood Furniture,* 701 F.2d 452, 463 fn. 35 (5th Cir. 1983) (quoting *TRW-United Greenfield Division v. NLRB,* 637 F.2d 410, 418 (5th Cir. 1981)).

a *general* announcement. As noted above, general employer solicitations of this type, with regard to campaign paraphernalia, have been found noncoercive in cases where employees are afforded the opportunity to decide for themselves whether to participate, free of any supervisory pressure or involvement, and in the absence of any independent coercive conduct or promises of benefits. We hold that these principles are generally applicable to employer solicitations for employees to appear in campaign videotapes as well.

We thus reject the Charging Party Union's position that employers may never solicit employees to appear in a campaign videotape regardless of the circumstances. According to the Union's statement of position, an employer,

> by soliciting employees to appear in its antiunion video, is soliciting the assistance of employees to dissuade their fellow employees from supporting a union and to disseminate the employer's antiunion views, conduct which the Board has held to be coercive no fewer than eighteen times.

Union Statement of Position at 14. In its brief, the Union then cites numerous cases in which the Board has held that an employer unlawfully asked employees to dissuade their fellow employees from supporting the union.[60] However, in each of these cases, the unlawful employer solicitation was accomplished by a direct request from a supervisor or other agent of the employer to an individual employee, using means which the Board found to be coercive under all the circumstances of the case. These cases thus stand only for the proposition, which the Board has also applied in the campaign paraphernalia cases, that an employer may not coercively solicit employees to campaign against the union. They do not establish that employers may never noncoercively offer employees the opportunity to participate in the employer's campaign, by means of a general solicitation as set forth above.

To the contrary, in the campaign paraphernalia cases discussed above, the Board found that employers may lawfully distribute antiunion t-shirts, stickers, and buttons to employees for the purpose of allowing the employees to voluntarily display those materials in the workplace.[61] In some cases, the materials distributed to employees were also worn by the employer's supervisors and managers to advance the employer's efforts to persuade employees to vote against representation.[62] It is evident, under these circumstances, that employees who choose to display such materials become, at least to some extent, participants in the employer's campaign opposing the union and are at least implicitly attempting to persuade their fellow employees to oppose union representation as well. So long as the means by which the employer distributes its campaign paraphernalia, and solicits employees to display it, are noncoercive, employees remain free to decide for themselves whether or not they wish to participate in the employer's campaign in this fashion. In our view, the same considerations apply when an employer seeks employees to participate in its campaign through the medium of a campaign videotape.

We nevertheless recognize that participation in an employer's campaign videotape is to some extent different from merely accepting (and/or wearing) antiunion campaign paraphernalia. Thus, the campaign videotape serves as a permanent record of the participating employees' opposition to the union. Unlike, for example, an antiunion button that an employee may simply cease wearing, an employee who chooses to appear in a campaign videotape cannot subsequently change his or her mind, and have the image removed, without approaching the employer and explicitly making known their change of heart. Accordingly, an employee's decision to appear in an employer's campaign videotape has consequences which are appreciably more permanent than a decision to wear antiunion paraphernalia.

These considerations do not, in our view, justify a complete ban on employee participation in employer campaign videotapes. The Act presupposes that employees are mature individuals who are fully capable of deciding for themselves whether or not to participate in a union election campaign in this manner.[63] In any event, we decline to hold that no employee may participate in an employer campaign videotape merely because of the possibility that some employee may subsequently have second thoughts.

However, we find that the foregoing considerations are sufficient to warrant a safeguard. We will require employers specifically to assure employees that participation in the videotape is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits. This assurance is similar to those which the Board requires employers to give before exercising the limited privilege to poll employees recognized in *Struksnes Construction Co.,*[64] discussed above.

[60] See, e.g., *PYA/Monarch, Inc.,* supra; *Hendrix Mfg. Co.,* supra.
[61] See cases cited in fn. 39, supra.
[62] See *Black Dot,* supra; *McDonald's,* supra; *Farah's,* supra.
[63] Cf. *Shopping Kart Food Market, Inc.,* 228 NLRB 1311, 1313 (1977) (Board regulation of the substance of misleading campaign propaganda is not necessary; "Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."), cited with approval in *Midland National Life Insurance Co.,* 263 NLRB 127, 132 (1982).
[64] 165 NLRB at 1062.

See also *Johnnie's Poultry,* 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), where the Board established specific safeguards for employer interrogations of employees in preparation for an unfair labor practice hearing.[65] We find that the safeguards set forth in those cases are relevant to the issue before us here because, as discussed above, an employee's decision to participate in an employer's campaign videotape, like the decision to respond to an employer's questioning concerning Section 7 activities under *Struksnes Construction Co.* or *Johnnie's Poultry,* may have lasting consequences.

Consistent with the foregoing discussion, we hold that an employer may lawfully solicit employees to appear in a campaign video if each of the following requirements is satisfied:

1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
2. Employees are not pressured into making the decision in the presence of a supervisor.
3. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.
4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.[66]
5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

As noted above, this rule conforms to the Board's approach in prior cases where employers have distributed campaign paraphernalia to employees, and with the Board's general approach in polling and interrogation cases. Employers are, of course, free to ask employees who volunteer to appear in a campaign videotape, under the circumstances set forth above, to sign an appropriate consent form memorializing their willingness to be filmed.[67]

B. An Employer May Also Lawfully Include Employees in a Campaign Videotape Which Does Not Indicate the Employees' Views Concerning Union Representation

We turn next to the second question presented by the court's remand: whether, and under what circumstances, may an employer who has *not* solicited employees to participate in a campaign videotape nevertheless use their images in the videotape without incurring Section 8(a)(1) liability. For the reasons set forth below, we hold that an employer may do so only if the employer observes safeguards designed to insure that the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation.

[65] In *Johnnie's Poultry*, the Board recognized that an employer may have a legitimate need to question employees about their union activities in the course of investigating a complaint charging the employer with unfair labor practices, in order to prepare the employer's defense at trial. Accordingly, the Board held that "where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability." The Board, however, established specific safeguards designed to minimize the coercive impact of the employer interrogation:

> the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

146 NLRB at 775. In denying enforcement of the Board's Order in *Johnnie's Poultry*, the Eighth Circuit did not express disagreement with the safeguards, but held that the Board's factual determinations in that case were "not supported by substantial evidence." 344 F.2d at 619. The D.C. Circuit applied the *Johnnie's Poultry* safeguards in *Auto Workers (Preston Products Co.) v. NLRB,* 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968).

[66] Contrary to his colleagues, Member Hurtgen would substitute, for this element of the test, the following requirement: "The employer has not engaged in unlawful conduct that is of such a character, and is so related in time, as to taint the solicitation process." The language adopted by the majority would prohibit an employer from lawfully soliciting its employees to participate in campaign videos simply because the employer has committed other violations, irrespective of how unrelated in character and remote in time these other violations are. Those other violations should be remedied, but they do not necessarily taint the otherwise lawful solicitation. In Member Hurtgen's view, a nexus must be established between the violation and the solicitation in order for the solicitation to be found violative of the Act.

[67] While there is no requirement under the Act that an employer obtain signed consent forms from employees before including them in a campaign videotape, we recognize that employers may wish to obtain such consent forms for other reasons including, for example, the need to comply with various state laws relating to the use of an individual's likeness.

We further recognize that some employers may wish to include in a campaign videotape "stock" footage of employees filmed for another purpose. In the event an employer wishes to obtain the consent of employees depicted in such footage to be included in a campaign videotape, including having the employees sign a written consent form, the safeguards set forth above must be observed, because a request that employees sign a consent form under those circumstances is equivalent to a request that employees participate in a campaign videotape.

As noted above, "the right to engage in union organizing or not is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute."[68] In other words, employees have the "right to express an opinion or to remain silent."[69] Accordingly, except in cases where an employee has volunteered to be included in a campaign videotape as set forth above, an employer violates employees' Section 7 rights by disseminating to employees a videotape which indicates, explicitly or implicitly, that a specific employee or employees either support or oppose unionization. In addition, in cases where the employee's actual position is at variance with the employer's statement, an employee's Section 7 rights are further infringed because the employee may be pressured into acting in conformance with the way he has been publicly identified rather than his true beliefs.[70] Employees depicted as opposing union representation, for example, may be inhibited from subsequently expressing support for the union, as they may be required to explain the discrepancy between their position as shown on the videotape and their subsequent statements, and thus, suffer the embarrassment of having to explain why they changed their minds.[71]

While the Board may not always have fully articulated these underlying principles in prior decisions, the Board has consistently found violations of the Act when an employer has compelled employees to express opposition to union representation. For example, in *Fieldcrest Cannon,*[72] the Board found that the employer violated Section 8(a)(1) by directing an employee to wear a "Vote No" t-shirt. Likewise, in *Florida Steel Corp.,*[73] the Board found that the employer unlawfully polled employees by requiring them to pose for photographs, prior to a Board-conducted election, while holding "vote no" signs prepared and given to them by the employer. And, as discussed above, in *Autoglass,*[74] the Board found that the employer violated Section 8(a)(1) by asking an employee to "help him out" by telling other employees that the union had "done him no good" at a prior job.

We recognize that, in specifically holding in *Sony* that the filming and presentation of the videotape at issue in that case violated Section 8(a)(1), the Board did not cite any of the cases discussed above. Nevertheless, that holding is, in our view, fully consistent with the foregoing principles because the *Sony* videotape, viewed as a whole, conveyed the message that specific, identifiable employees opposed union representation. Thus, as discussed above, the videotape urged employees to decertify the union, and the images of the employees depicted therein were accompanied by a song stating, in part, that "we won't lose if we decertify, and that's enough for me." The coercive impact of the *Sony* videotape was heightened by the employer's decision affirmatively to misrepresent its purpose during the filming process, by telling the employees that the filming was for other purposes unrelated to the campaign. The employer's misrepresentation forestalled any attempt by employees to exercise their Section 7 right to refrain from participating in the employer's campaign activities, and, moreover, reasonably tended to induce the employees to cooperate, and to participate with enthusiasm when they might otherwise have declined to do so. The resulting images, which would appear to show vigorous support for the employer's position, would be even more difficult for employees subsequently to disavow in connection with an expression of support for the union's position. In these circumstances, and for the reasons set forth above, we agree with the Board's holding in *Sony* that the videotape was unlawful and we reaffirm it.

We recognize that the *Sony* decision additionally noted that the employer had filmed the videotape, and presented it to employees, without obtaining the consent of the employees depicted therein. Based on this aspect of the decision, *Sony* has been construed as potentially establishing a blanket requirement that employers must obtain employees' explicit consent before including their images in campaign videotapes.[75] We find that such a per se rule was unintended and unwarranted.[76]

The *Sony* decision did not address the possibility that an employer could include employees in a campaign videotape in circumstances in which the videotape, viewed as a whole, does *not,* explicitly or implicitly, indicate the position of the employees on the subject of unionization. An employer's use of employee images violates Section 8(a)(1) only if it has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in the circumstances of a particular case. We perceive no basis for finding that the inclusion of employees' images in a videotape that does not convey a message about the employees' views concerning union representation, without more, would violate Section 8(a)(1). The filming and presentation of such a videotape would not contravene the em-

[68] *Dawson Construction Co.,* supra, 320 NLRB at 117.
[69] *Texaco, Inc. v. NLRB,* supra, 700 F.2d at 1043.
[70] *Sony,* supra at 428–429.
[71] Id. at 428.
[72] 318 NLRB 470, 496 (1995), enfd. in pert. part 97 F.3d 65, 72, 74 (4th Cir. 1996).
[73] 224 NLRB at 588–589, 594.
[74] 264 NLRB at 153.
[75] *Allegheny Ludlum v. NLRB,* supra, 104 F.3d at 1362.
[76] To the extent *Sony* can be read as establishing such a per se rule, it is overruled.

ployees' Section 7 right to choose whether to express an opinion or remain silent, as discussed above, because the videotape would not have represented the employees' views. Likewise, such a videotape would not interfere with the depicted employees' ability subsequently to express freely their own views concerning union representation, because the videotape would not have created any prior representation of the employees' position which the employees would have to disavow.

Consistent with the foregoing principles, we hold that employers may lawfully include the images of employees in a campaign video (including "stock footage" taken prior to the campaign for other purposes), even if the employees have not volunteered to participate in the campaign videotape as set forth in Section III A above, under the following circumstances:

1. The employees were not affirmatively misled about the use of their images at the time of the filming;
2. The video contains a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it; and
3. Nothing in the video contradicts the disclaimer. Accordingly, viewed as a whole, the video does not convey the message that employees depicted therein either support or oppose union representation.

For the reasons fully set forth above, however, to the extent that an employer wishes to obtain the consent of employees to be included in a videotape of this character, that consent may only be requested under the terms set forth in Section III A.

IV. SUMMARY

For all of the foregoing reasons, we hold that an employer may not lawfully include the images of an employee in a campaign videotape, in circumstances where the videotape reasonably tends to indicate the employee's position on union representation, unless the employee volunteers to participate in the videotape under the noncoercive circumstances set forth above in Section III A. An employer may lawfully film employees, and present a campaign videotape including their images, without previously soliciting their consent to be filmed, only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation and the employer complies with the remaining requirements set forth above in Section III B. While an employer is not required, under the Act, to obtain consent from employees to be included in a campaign videotape which meets these latter requirements, any efforts to obtain such consent must comply with the safeguards set forth above for soliciting employee participation in a campaign videotape.

V. APPLICATION TO THIS CASE

Applying the foregoing principles to the facts of this case, we find that the Respondent violated Section 8(a)(1) by approaching individual employees and asking them to consent to be filmed for the purpose of a campaign videotape, and by requiring employees to register an objection with an agent of the Respondent in order to avoid being included in its campaign videotape. These actions are inconsistent with the safeguards set forth above in several ways. First, the Respondent failed to conduct its solicitations in the form of a general announcement, but instead forced employees "to make an observable choice that demonstrates their support for or rejection of the union."[77] Second, the Respondent failed to give employees the required assurances that participation in the videotape was voluntary, and that nonparticipation would result in no reprisals and participation would bring no rewards or benefits. Third, we find that the other unfair labor practices committed by the Respondent, which included threats of job loss and layoffs and the discriminatory discharge of a leading union activist, created an atmosphere which would reasonably tend to coerce employees into agreeing to participate in the videotape.[78] A substantial number of unit employees were subjected to requests to participate,[79] which were coordinated by the Respondent's Manager of Communications. Accordingly, we reaffirm our finding that the Respondent's solicitation of employees to participate in its campaign videotape, and its requirement that employees wishing to "opt out" notify the Respondent or its agents, constituted an unlawful poll of employees in violation of Section 8(a)(1) of the Act.

We additionally observe that the inclusion of the employees' images in the Respondent's videotape reasonably tends to suggest that they opposed union representation. Thus, as in *Sony,* the employees are shown, in many instances smiling and waving, while upbeat music plays and the voices of a narrator and of other employees urge employees to vote against union representation. The videotape does not contain a disclaimer stating that it is not intended to reflect the views of the employees appearing in it. In these circumstances, if the issue were

[77] *Barton Nelson, Inc.,* supra.

[78] The coercive impact of the Respondent's actions was heightened by the requirement that employees wishing to be edited out of the videotape submit their requests in writing, and by the Respondent's maintenance of a list of objectors. See *House of Raeford Farms,* supra, 308 NLRB at 570.

[79] *Florida Steel Corp*., supra.

before us, we would find that the presentation of the videotape, without first obtaining the employees' consent, by noncoercive means consistent with the safeguards specified in this decision, additionally violated Section 8(a)(1) for the reasons set forth in Section III B, above.

ORDER

The National Labor Relations Board reaffirms its prior order in this case and orders that the Respondent, Allegheny Ludlum Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling employees about their union sentiments, by distributing to employees a written notice that employees who wish to be excluded from a company-sponsored video for use in its antiunion campaign should notify agents of Respondent that they did not desire to be included in the film's footage.

(b) Polling employees about their union sentiments by orally advising them that those employees who desired not to be included in a campaign video must submit a written request to the Respondent stating that they wished not to be included in the film's footage.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[80] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 1994.

[80] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues except as to one issue. In those instances where individual employees have openly and voluntarily expressed their opposition to union representation, I would permit the employer to directly solicit their participation in its campaign video, provided that such solicitation occurs in a noncoercive way. In my view, such direct solicitation is permissible because it does not interfere with Section 7 rights. Thus, because these employees, by their own conduct, have openly demonstrated their opposition to the union, they are not being placed in a position where they reasonably would feel pressured to "make an observable choice that demonstrates their support for or rejection of the union." *Barton Nelson, Inc.,* 318 NLRB 712 (1995). In these circumstances, the employer's direct solicitation does not constitute unlawful polling or interrogation. Nor do I find that it otherwise coerces these employees in the exercise of their Section 7 rights.

I find direct support for my position in the court order remanding this case to the Board. In *Allegheny Ludlum Corp. v. NLRB,* 104 F.3d 1354, 1363–1364 (D.C. Cir. 1997), the court held that, in determining whether an employer lawfully may solicit its employees to participate in a company campaign video, a balance necessarily must be struck between the conflicting mandates of Section 8(a)(1)—which protects employees' Section 7 rights, and Section 8(c)—which safeguards employer free speech rights. In striking this balance between employer free speech rights and employees' right to be shielded from unlawful "polling" of their union sentiments, the court held that "[c]learly *some* methods of soliciting employees to appear in antiunion video presentations would not raise significant 'polling' concerns." In this regard, the court indicated that an employer lawfully could solicit its employees to appear in a company campaign video where those employees "on their own initiative clearly [had] expressed opposition to union representation." As noted by the court, such direct solicitation would not raise "polling" concerns, or run afoul of employer free speech rights. Rather, in the court's view, such direct solicitation of open union opponents fell within the "safe harbor" of permissive employer conduct. I agree.

Further, just as the court concluded that an employer's direct solicitation of open union opponents would not constitute unlawful polling, Section 8(a)(1) "interroga-

tion" cases support the view that such direct solicitation likewise does not restrain or coerce employees in the exercise of their Section 7 rights.

It is well settled that interrogations do not per se violate Section 8(a)(1). "To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference." *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980), and cited cases. Further, the test under Section 8(a)(1) is whether the challenged conduct has a reasonable tendency, *under all of the circumstances*, to interfere with employees' Section 7 rights. *Sunbelt Mfg., Inc.*, 308 NLRB 780 fn. 3 (1992), enfd. mem. 966 F.2d 305 (5th Cir. 1993). Clearly, in the context where employees have already made public their antiunion views, an employer's solicitation to appear in its campaign video would not interfere with those rights.

Rossmore House, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), supports this conclusion. In *Rossmore*, the Board sought to balance Section 8(a)(1) and 8(c) rights, and held that:

> "[T]he Supreme Court recognized in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 . . . (1969), [that] the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit," . . . This right is recognized in section 8(c) of the Act. If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize.

Applying this balancing process, the Board held in *Rossmore* that an employer's questioning of employees who were active and open union supporters, about their union activities, did not violate Section 8(a)(1) where the questions were unaccompanied by threats or promises. Id. This was because the Board recognized that such questioning of a known union adherent reasonably would not tend to restrain, coerce, or interfere with rights guaranteed by Section 7 of the Act. *Blue Flash Express*, 109 NLRB 591 (1954). See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The same rationale is applicable here. That is, employees who have openly expressed their opposition to the Union reasonably would not be restrained or coerced by their employer's request that they participate in its campaign video.

I disagree with my colleagues that allowing employers to directly solicit their openly antiunion employees to participate in campaign videos is neither "wise [n]or workable." As to the "wisdom" of my approach, I find that it fairly and prudently balances the competing rights and interests of Section 7 and 8(c). As to "workability," I reject the majority's claim that it would be difficult, in practice, to determine whether an employee has sufficiently identified himself as antiunion. Decades of decisional law in 8(a)(1) interrogation cases make clear that my approach is eminently workable. Further, even assuming that my approach calls for greater case-by-case analysis than the blanket prohibition espoused by my colleagues, the need for balancing competing statutory interests outweighs expediency.

My colleagues argue that an employer should be precluded from directly soliciting employees, even if those employees have openly opposed the Union. In this regard, my colleagues say that an employee who has openly opposed the Union has not necessarily chosen to participate in an antiunion video. I agree. However, the issue here is whether such an employee would be coerced by the employer's simply *asking* the employee to participate. In my view, it defies logic and common sense to say that such an employee would be coerced by the question. After all, as my colleagues concede, the employee is already "attempting to persuade [his/her] fellow employees to oppose union representation as well." The employer is simply *requesting* the employee to engage in further persuasive activities.

Further, employees who openly oppose a union are free to reject the employer's request. Similarly, those employees are protected from employer coercion, i.e., the employer's request cannot contain threats or promises. They are also protected from reprisal, should they decline the request. My point is that the request alone is not coercive.

The cases on which my colleagues rely do not support their position. As illustrated in *Dawson Construction Co.,* 320 NLRB 116 (1995), the conduct proscribed in those cases is employer *compulsion* of employees to participate publicly in the labor dispute, thereby forcing those employees to waive their rights to "express an opinion or to remain silent" in the labor dispute. *Texaco, Inc. v. NLRB,* 700 F.2d 1039, 1043 (5th Cir. 1983). See also *Scientific Atlanta,* 278 NLRB 467 (1986). Those principles are inapplicable in two respects. First, they involve situations where the employee is forced to waive his right to remain silent as to a labor issue. Where, however, the employee has already publicly proclaimed his or her antiunion sentiments, the right to remain silent is not implicated. Second, these cases involve instances

where employers forced or compelled employees to participate in the dispute.[1] That is not the situation encompassed by my view. Thus, while employers, in my view, would be free to ask openly antiunion employees to participle in its video, they could not force participation or use threats, force, or coercion to achieve participation.

Similarly, I find unpersuasive my colleagues' citation *to Gonzales Packing Co.,* 304 NLRB 805 (1991), and related cases to support their view that merely requesting open union opponents to participate in its campaign video violates Section 8(a)(1). In *Gonzales*, the respondent made a broad-scale appeal to employees, in the presence of others, to display antiunion insignia. This appeal was made without regard to whether those individuals had yet manifested their union views, and was found to be an effort to coerce them into making an observable choice. Indeed, even as to those employees who had expressed some opposition to unionization, there was a real question in *Gonzales* as to whether they properly could be termed as open opponents of the union. These individuals already had eschewed wearing "NO" stickers which the respondent had widely disseminated, and they were nonetheless publicly confronted by management and solicited to wear those stickers. As found in *Gonzales*, this solicitation was coercive because those employees had "already given indirect indications of a sort that they were unwilling, for whatever reason, to become visibly associated with the "NO" movement." That is not the case where employees have voluntarily and openly expressed their opposition to union representation. Nor have these employees previously indicated an unwillingness to appear in a video.[2]

Finally, if there is anything to be learned from the cases in this area, it is that the law eschews a per se approach. My colleagues have endorsed such an approach. I do not. More particularly, I consider the following circumstances: the employee is openly antiunion; the question occurs in a noncoercive way; the employee is free to decline the request. My colleagues, on the other hand, take a per se approach.

In sum, I find that an employer lawfully can directly solicit, for its campaign videos, employees who have openly and voluntarily demonstrated their opposition to the union. In all other respects, I agree with the majority.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT poll our employees about their union sentiments, by distributing to employees a written notice that employees who wish to be excluded from a company-sponsored video for use in our antiunion campaign should notify us that they do not desire to be included in the film's footage.

[1] In *Dawson*, the respondent ordered its employee to carry a reservegate sign and terminated him when he refused.

[2] All other cases are distinguishable and are quite consistent with my view. See *PYA/Monarch, Inc.,* 275 NLRB 1194 (1985) (employee whom respondent sought to enlist to encourage others to vote against the union was not open union opponent, but had communicated his "mixed" feelings and "confusion" to respondent on issue of union representation. Accordingly, respondent's appeal was "attempt to change the employee's feelings and recruit him to the Employer's campaign against the Union."); *Hendrix Mfg. Co.,* 139 NLRB 397 (1962)(violation where respondent first interrogated employee about his union views and then instructed employee to get coworkers to vote against the union.); *Medical Center of Ocean County*, 315 NLRB 1150 (1994) (respondent promised two employees, one of whom had expressed support for the union, that it would remedy work problems if given 6-month period, then asked the two employees to convince others to forego the union); *Autoglass & Upholstery Co*., 264 NLRB 149 152–153 (1982) (after twice unlawfully interrogating employee about his union views, respondent solicited employee to tell coworkers that he opposed the union). As these cases make clear, the issue presented to the Board was not whether a respondent violates the act by approaching open union opponents about participating in its campaign video, but whether the Act is violated in circumstances where the employees had expressed support for the union, had expressed no views on the issue of representation, or were subjected to a request in the context of unlawful conduct.

Further, contrary to my colleagues, these cases do not say that the conduct therein was "inherently coercive," i.e., that the Board embraces a per se approach.

WE WILL NOT poll our employees about their union sentiments by orally advising them that those employees who desired not to be included a campaign video must submit a written request stating that they wish not to be included in the film's footage.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALLEGHENY-LUDLUM CORP.